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No. ____

In The
# Supreme Court Of The United States
October Term, 1995

DAVID GREEN,
*Petitioner*

v.

STATE OF CONNECTICUT,
*Respondent*

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

I. DOES THE DECISION OF THE UNITED STATES SUPREME COURT IN SANTOBELLO V. NEW YORK, 404 U.S. 257 (1971) APPLY WITH EQUAL FORCE TO A JUDICIAL PLEA AGREEMENT WITH A DEFENDANT ENTITLING HIM TO SPECIFIC PERFORMANCE OF A PLEA BARGAIN, AND HAVE THE CONNECTICUT COURTS VIOLATED THE RULE OF LAW AS EMBODIED IN THAT CASE?

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**October Term, 1995**

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**DAVID GREEN**

**Petitioner**

**V.**

**STATE OF CONNECTICUT**

**Respondent**

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**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT**

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The Petitioner, David Green, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of the State of Connecticut entered in this proceeding on December 20, 1994 and to review the judgment of the Supreme Court of the State of Connecticut entered in this proceeding on February 10, 1995.

## CITATION

A decision of the Connecticut Supreme Court, State of Connecticut v. David Green, (a copy of which is annexed hereto), denying petitioner's Petition for Certification to Appeal after a decision of the Connecticut Appellate Court, State v. David Green, 36 Conn.App. 933 (a copy of which is annexed hereto).

## JURISDICTIONAL GROUNDS

On March 11, 1994, the Connecticut Superior Court sentenced David Green on a finding of guilty on a plea of *nolo contendere* in violation of his rights provided by the United States Constitution and the Connecticut Rules of Court. On March 21, 1994, David Green filed an appeal with the Connecticut Appellate Court. On December 20, 1994 the Connecticut Appellate Court entered judgment affirming the conviction and sentence of David Green. Thereafter on January 3, 1995, in accordance with Connecticut Rules of Court, Section 4126 *et seq.* a Petition for Certification by the Connecticut Supreme Court was filed which Petition was denied on February 10, 1995.

The jurisdiction of this Court is invoked under the authority of 28 U.S.C.A. § 1257 (3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The petitioner relies upon the following provisions of the United States Constitution with respect to the Question Presented:

Article III, Section 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Article III, Section 2.

The judicial Power shall extend to all Cases, in law and Equity, arising under this Constitution, the Laws of the United States, and treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; - to Controversies between two or more States; - between a State and Citizens of another State; - between Citizens of different States, - between Citizens of the same State claiming Lands under Grants of different States , and between a State, or the Citizens thereof, and foreign States Citizens or Subjects.

Article V.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## FEDERAL RULES OF CRIMINAL PROCEDURE

The petitioner relies upon the following provisions of the United States Constitution with respect to the Question Presented:

**11(e)(1)(c)**

**(e) Plea Agreement Procedure**

**(1) In General.**

The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose, the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

**11(e)(2)**

**(2) Notice of Such Agreement**

If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

**11(e)(3)**

**(3) Acceptance of a Plea Agreement**

If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

**11(e)(4)**

**(4) Rejection of a Plea Agreement**

If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court or is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant

persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

## CONNECTICUT RULES OF CRIMINAL PROCEDURE

The petitioner relies upon the following provisions of the United States Constitution with respect to the Question Presented:

### § 687 Procedure for Plea Discussions - In General

The prosecuting authority and counsel for the defendant, or the defendant when he is not represented by counsel, may engage in discussions at any time with a view towards disposition. Negotiations may occur either prior to or after the arraignment. The prosecuting authority shall be in his office at reasonable times for the purpose of giving counsel for the defendant, and to all others in interest, a reasonable opportunity for consultation with him. (P.B.1963, Sec. 2098.)

### § 688 Procedure for Plea Discussions - Discussions with Defendant

The prosecuting authority shall not engage in plea discussions at the disposition conference, or at other times, directly with a defendant who is represented by counsel, except with his counsel's approval. If the defendant refuses to be represented by counsel or waives his right under Sec. 961, the prosecuting authority may properly discuss

disposition of the charges directly with the defendant. (P.B. 1963, Sec. 2099.)

**§ 690 Procedure for Plea Discussion - Subject Matter**

Discussion need not be limited to the entry of a plea of guilty or nolo contendere, and may include any disposition without trial permitted under these rules or the General Statutes. The parties may also discuss pretrial motions filed or yet to be filed which would lead to a disposition of the case without trial. (P.B.1963, Sec. 2101.)

**§ 696 Procedure for Plea Discussion - Acceptance of Plea Agreement - Sentencing**

If the judicial authority accepts the plea agreement, he shall embody in the judgment and the sentence the disposition provided for in the plea agreement or another disposition more favorable to the defendant than that provided for in the plea agreement. (P.B.1963, Sec. 2107.)

**§ 697 Procedure for Plea Discussions - Acceptance of Plea Agreement - Continuance for Sentencing.**

If the case is continued for sentencing, the judicial authority shall inform the defendant that a different sentence from that embodied in the plea agreement may be imposed on the receipt of new information or on sentencing by another judicial authority, but that if such a sentence is imposed, the defendant will be allowed to withdraw his plea in accordance with Sec. 719. (P.B.1963, Sec. 2108.)

**§ 706 Disposition Conference - Nature of Conference - Notice of Agreement**

If the parties reach an agreement which contemplates the entry of a plea of guilty or nolo contendere, they may advise the judicial authority in advance of the plea. The judicial authority may indicate whether he will concur in or reject the proposed disposition. (P.B. 1963, Sec. 2117).

## STATEMENT OF THE CASE

The petitioner, David Green, was charged with Aiding and Abetting Assault in the First Degree, in violation of Connecticut General Statutes §§53a-8 and 53a-59(a)(1), and Conspiracy to Commit Assault in the First Degree, in violation of Connecticut General Statutes §§53a-48(a) and 53a-59(a)(1).

On October 13, 1993, October 27, 1993, November 30, 1993 and January 14, 1994, the petitioner's case was pretried with the Honorable John J. Ronan of the Connecticut Superior Court, in the Judicial District of New Haven, at New Haven. During these pretrials the State was represented by State's Attorney Michael Dearington and the petitioner was represented by either Attorney Cheryl E. Heffernan or Attorney Timothy C. Moynahan. At these pretrials, the facts of the State's case against the petitioner including its weaknesses, the explicit nature of the victim's injuries, and the victim's attitude and position were explored in great detail. At the final pretrial of January 14, 1994, Judge Ronan negotiated and unconditionally concluded a plea agreement with the petitioner which provided for the petitioner to plead guilty to Conspiracy to Commit Assault in the First Degree with the remaining charge to be nolled by the State. In exchange Judge Ronan agreed to sentence the petitioner to three and one half years incarceration to be served consecutively to a sentence he was serving in a Florida case. On January 14, 1994, the petitioner entered a plea of *nolo contendere* to the conspiracy charge, which was accepted by the court after a lengthy plea canvas, and a finding of guilty was made. The Court further placed on the record its plea agreement with the petitioner. As an

afterthought[1], the case was then continued to provide the alleged victim with an opportunity to address the court before the petitioner was sentenced in accordance with the plea agreement. The presentence investigation had been waived by the parties and the Court per the plea agreement.

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[1] T.1/14/94,pp 12-13
THE COURT: The court finds the plea enters (sic) knowingly, intelligently, and voluntarily with an understanding of the charge it's possible penalties. I do find a factual basis. The plea is accepted, recorded, finding of guilty may enter. PSI ordered.
MR.MOYNAHAN: Your Honor, we have an agreement that we've discussed with the Court that there would be a waiver of the requirement for a PSI and he'd be sentenced today.
THE COURT: Mr. Dearington?
MR. DEARINGTON: That's fine. I would just like to make a comment that the victim in this case who has followed this case from day one, which is approaching five years, has followed it closely and remained -- has been in contact since my office became involved on a weekly basis and, obviously, has a great interest in this case. He is in California this week. I related the possibility of a plea in a conversation with him this morning and as I indicated during pretrial discussions, he does not feel that this is an appropriate resolution of the matter, and --
THE COURT: -- When is he coming back?
MR. DEARINGTON: I believe this weekend.
THE COURT: I'll defer the sentencing then. Let him come in and have his say on the record. Mr. Dearington, that's what he should do...
THE COURT: All right. The twentieth. Sentencing will take place then.

On January 20, 1994, after the alleged victim was heard the Judge unilaterally reneged on his plea agreement with the petitioner and advised him that he could withdraw his plea and proceed to trial. The petitioner refused to withdraw his plea and requested the court orally and by way of written motions to sentence him in accordance with the plea agreement. In support of the petitioner's requests the petitioner relied on this Court's holding in Santobello v. New York, 404 U.S.257 (1970) and its progeny. (See appendix for text of petitioner's motion for specific performance of plea agreement and memorandum in support thereof.) These requests were denied by the court. Judge Ronan subsequently ordered a presentence investigation and continued the case for sentencing.

On March 11, 1994, the court sentenced the petitioner on the conspiracy charge to twenty years, execution suspended after fifteen years with five years probation, to be served consecutively to his current Florida sentence. The remaining charge was nolled by the State.

The petitioner filed an appeal from that judgement to the Connecticut Appellate Court on March 21, 1994. On December 19, 1994, the Appellate Court affirmed without a written opinion the trial court's actions. State v. Green, 36 Conn.App. 933 (1994). On January 3, 1995, the petitioner filed a Petition for Certification to the Connecticut Supreme Court which was denied on February 10, 1995, also without opinion.

## ARGUMENT OF LAW

**I. Does the decision of the United States Supreme Court in Santobello v. New York, 404 U.S. 257 (1971) apply with equal force to a judicial plea agreement with a defendant entitling him to specific performance of the plea bargain, and have the Connecticut Courts violated the rule of law embodied in that case?**

The question presented and its answer possesses tremendous moral gravity as well as a legal issue of paramount substance. Connecticut law authorizes a trial judge to participate in pre-trial conferences in a supervisory capacity. State v. Fullwood, 194 Conn. 573, 484 A.2d 435 (1984).

Moreover Connecticut's rules of procedure anticipate a situation where a sentence is bargained for subject to a condition and delineates precisely a judge's role under that circumstance. Connecticut Practice Book Section 697. Connecticut's rules also define the court's obligation to impose a promised sentence when a plea bargain is entered into unconditionally. Conn.P.B. 696.

A prosecutor is bound to keep a promise made to a defendant to recommend a specific sentence where no condition is reserved and the plea is accepted by the court. The defendant must not be deprived of fundamental rights when the prosecutor is the judge. When the judge voluntarily becomes the prosecutor, the two offices become indistinguishable and the defendant's rights are correspondingly imperiled.

Our courts have recognized the importance of plea bargaining to the system and its dangers. Specifically, the danger of a defendant being induced to surrender his constitutional rights by the pervasive influence of the government. Consequently case law and rules of court have evolved setting forth required procedures and enforcement guarantees for illegally breached bargains. Santobello v. New York, 404 U.S. 257 (1971) and its progeny, Federal Rules of Criminal Procedure, Rule 11, and Connecticut Rule of Criminal Procedure Sections 695, et seq.

**A. Santobello v. New York and its Progeny:**

In Santobello v. New York, 404 U.S. 257 (1971), this Court held that "when a guilty plea is induced by promises arising out of a plea bargaining agreement, fairness requires that such promises be fulfilled by the state." Id. at 261. Santobello, involved the breach of a plea agreement by a prosecutor, an act which the United States Supreme Court found to be not only morally offensive but constitutionally reprehensible. Accordingly, the Court ruled that a defendant should be entitled to either specific performance of the breached plea agreement or an opportunity to withdraw his induced plea. [1]

Since the decision in Santobello, numerous courts have addressed the issue of prosecutor-breached plea

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[1] Four members of the majority in Santobello suggested that the defendant might be entitled to specific performance if he requested it. Also note, in his concurrence, Justice Douglas wrote: "... a court ought to accord a defendant's preference considerable, if not controlling, weight..." Santobello, at 267.

agreements and have ruled accordingly, protecting the defendant's expectation interests and constitutional right to properly negotiated and carried-out plea bargains.[2] The decisions of the Courts in Santobello and its progeny clearly express the views that it is fundamentally unfair for the State to create and then ignore a defendant's expectations. The Court in Geisser v. United States discussed the wide disparity of power and the unfairness inherent in plea bargaining. "This is an extraordinary case calling for extraordinary action. It is a case of the great United States going back on its word in a plea bargain, made by the Department of Justice..." 513 F.2d 862, 863 (5th Cir. 1975) (emphasis added). Our standards of substantive due process hold a State to a particularly high

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[2] For example see: United States v. Anderson, 970 F.2d 602 (9th Cir. 1992), rehearing denied, 990 F.2d 1163 (9th Cir. 1993); United States v. Yesil, 968 F.2d 1122 (11th Cir. 1992); United States v. Boatner, 966 F.2d 1575 (11th Cir. 1992); United States v. Canada, 960 F.2d 263 (1st Cir. 1992); United States v. Bohn, 959 F.2d 389 (2nd Cir. 1992); Palermo v. Warden, 545 F.2d 286 (2nd Cir. 1976), cert. dismissed, 431 U.S. 911 (1976); Geisser v. United States, 513 F.2d 862 (5th Cir.1975); People v. McCormick, 859 P.2d 846 (Colo. 1993); Nelson v. State, 596 So.2d 1272 (Fla.App.2d Dist. 1992); State v. Littlejohn, 199 Conn. 631, 508 A.2d 1376 (1986); State v. Tourtelotte, 88 Wash. 579, 5643 P.2d 799 (1977); People v. Reagan, 395 Mich. 306, 235 N.W.2d 581 (1975); State v. Thomas, 61 N.J.314, 294 A.2d 57 (1972); .

duty when it makes promises to defendants in a criminal case. As the Second Circuit said in holding the State to a plea agreement, "...fundamental fairness and public confidence in government officials require that prosecutors be held to meticulous standards of both promise and performance." Palermo v. Warden, Green Haven State Prison, 545 F.2d 286 (2d Cir. 1976), cert. dismissed, 431 U.S. 911 (1976). Citing Correale v. United States, 479 F.2d 944, 947 (1st Cir. 1973). In a civilized society, we generally assume that people keep their promises. A judge's obligation of fairness and reliability is amplified when the power of the State is pitted against the liberty interests of a defendant. Judges are among the most visible representatives of the justice system in plea agreement negotiations. Within the institution in which trial judges must operate, their conduct above that of all others must be irreproachable. Therefore, the question arises, should we as a society of law and equity hold judges to the same high standards and those to which we hold prosecutors?

While various courts have addressed the issue of prosecutor- breached plea bargains and recognized the impact such have on the integrity of our judicial system, few courts have had to deal with the issue presented here: A breached judicial plea agreement. [3] In State vs Freeman, 115 R.I. 523, 351 A.2d 824 (1976) the Rhode Island Supreme Court was confronted with such an issue. In that case as here, the judge not only participated in plea negotiations, but was instrumental in obtaining the plea agreement. The Rhode Island judge stated in open court at

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[3] It is rare for a judge to participate directly in the agreement. The traditional and accepted judicial role is that of supervisor.

the time of the plea that he would impose the recommended sentence. Subsequently, the trial court in Freemen, ruled that it was not bound by the principles of Santobello and refused to sentence the defendants in accordance with the plea agreement. The defendants' guilty pleas were withdrawn and the trial resulted in their conviction.

On appeal, the Rhode Island Supreme Court, relying on Santobello, found error:

> In the circumstances of this case where the trial justice not only participated in the plea bargain agreement but in addition stated in open court the sentence he would impose, we find no relevant difference between a situation where the prosecution fails to make a promised recommendation and where the trial justice fails to impose a promised sentence since in either case the promise clearly is part of the inducement or consideration for the plea of the accused and such promise must be fulfilled. Freeman, at 829.

See also United States v. Spambanato, 687 F.Supp. 46 (D.Conn. 1988), affirmed, 876 F.2d 5 (1988); State v. Tourtelotte, 88 Wash 579, 564 P.2d 799 (1977); and, Correale v. United States, 479 F.2d 944 (1st Cir. 1973); which have held that where a judge has either made herself a party to a plea agreement between the defendant and prosecutor or has made a separate plea bargain with the defendant, she must abide by her agreement.

When a judge takes a more active role in plea

negotiations than is traditionally accepted, [4] he must be viewed no longer as a neutral magistrate. Therefore, the Judge must honor the agreement just as the prosecutor must.[5]

In the case at bar not only did the judge accept the agreement, the judge played a dominant role by initiating and fashioning the agreement with the defense.[6]

The judge's approval of the plea was twofold. first,

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[4] See ABA Standards Relating to The Function of the Trial Judge Section 4.1(a); F.R.Crim.P. Rule 11(e)(1)(c); Conn.P.B. Section 687, 688, 706.

[5] See: United States vs. Spambanato, 687 F.Supp. 46, 48 (D.Conn. 1988) ("A plea agreement cannot limit a judge's sentence unless the judge has been a party to the agreement, i.e., has agreed to abide by its terms or is deemed to have acquiesced in doing so.")

[6] THE COURT: Recommendation?
MR. DEARINGTON: I believe we're deferring to your Honor on this.
THE COURT: Court indicated sentence three and a half years to serve consecutive to the sentence he's serving in Florida which, am I correct was 22 years?
MR. MOYNAHAN: Yes, your Honor.
THE COURT: Connecticut'ssentence will be consecutive to that, three and a half. Mr Moynahan, anything else you want to add to the record?
MR. MOYNAHAN: No, your Honor

by engaging in negotiations with defense counsel, and second, by explicitly stating on the record "there is agreement."[7] The petitioner fulfilled his part of the bargain. The State's Attorney affirmed his acquiescence to the agreement.[8] The court accepted the petitioner's plea, again on the record.[9] The petitioner and society must be able to hold a judge of the Superior Court to the same standard of integrity and honor as that to which a prosecutor is held.

B. **Connecticut Rules of Criminal Procedure**

The Connecticut Rules of Criminal Procedure Section 686 et seq provide for the procedure the court must

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[7] THE COURT to DEFENDANT GREEN: "And do your understand if there were no agreement here, there is, but if there were not, the maximum penalty here would be twenty years to serve and the minimum sentence is one year..." (T. 1/14/94 at 11).

[8] THE COURT: Do either counsel know any reason why the plea should not enter?
MR. DEARINGTON: No, your Honor.
(T. 1/14/94 at p. 11)

[9] THE COURT: The Court finds the plea entered knowingly, intelligently, and voluntarily with the understanding of the charge its possible penalties. I do find a factual basis. The plea is accepted, recorded, finding of guilty may enter..."
(T. 1/14/94 at p.12).

utilize in handling plea agreements. Section 696 specifically provides that where "... the judicial authority accepts the plea agreement, he shall embody in the judgement and the sentence the disposition provided for in the plea agreement or another disposition more favorable to the defendant than that provided for in the plea agreement." Conn.P.B. Section 696 (emphasis added). Additionally, where the plea agreement has not been accepted by the court at the time of entry of the plea and the case continued for sentencing, Section 697 provides that the "judicial authority shall inform the defendant that a different sentence from that embodied in the plea agreement may be imposed on the receipt of new information... but that if such a sentence is imposed, the defendant will be allowed to withdraw his plea..." Conn.P.B. Section 697, (emphasis added).

Here the Court not only neglected to advise the petitioner pursuant to Superior Court Rules Section 697,[10] but, stated for the record that the sentence was by agreement, thereby accepting the plea agreement.[11] Therefore, pursuant to Superior Court Rules Section 696, the court had no option other than to sentence the petitioner in accordance with the plea agreement or a more favorable disposition. A withdrawal of the guilty plea and a trial is

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[10] Instead the court specifically informed the petitioner that he would not be permitted to withdraw his plea.

"THE COURT: And do you understand, now, Mr. Green, once I do accept this plea, you will not have the right to change your mind..."
(T. 1/14/94 at p.11).

[11] See footnote 7.

not a more favorable disposition.

Judge Ronan's failure to follow the Connecticut Rules of Criminal Procedure has resulted in a denial of the petitioner's due process rights guaranteed him under the United States and Connecticut Constitutions. Miller v. Commissioner of Correction, 29 Conn.App. 779, 617 A,2d 933 (1992). The only remedy appropriate which would provide the petitioner with due process requires the Court to honor the mandate set forth in Superior Court Rules Section 696. The petitioner should be sentenced in accordance with the accepted plea agreement or another more favorable disposition.

## C. Federal Rule of Criminal Procedure, Rule 11

The Federal Judicial System created Rule 11 which sets out the procedure required in Federal criminal cases when a defendant enters into a plea agreement. The Rule recognizes the importance of plea bargaining and of insuring the integrity of the judicial system when plea bargains are at issue. Rule 11 requires that any plea agreement be placed on the record. Fed.R.Crim.P., Rule 11(e)(2). Once that has occurred the court "may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there is an opportunity to consider the presentence report". Fed.R.Crim.P., Rule 11(e)(3)(4). The Rules further provide that [i]f the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement," Id. The federal courts have held that if the court, on the record, indicates the acceptance of the plea agreement, the court will be bound by it. See, Santobello.

In United States v. Blackwell, 694 F.2d 1325

(D.C.Cir. 1982), the trial court accepted a plea agreement between the prosecutor and a defendant. Subsequent to acceptance of the plea by the court and sentencing, the judge and the prosecutor advised the defendant that they would renege on the plea agreement if the defendant testified for another criminal defendant. The Court of Appeals for the District of Columbia held that under Rule 11, neither the prosecutor nor the trial judge had the power to renege on a plea bargain that had been accepted by the court and ordered the bargain to be specifically performed. "Pleas that bind only the defendant, or even the prosecutor and the defendant, but not the judge, would be unfair to the defendant and would dilute the incentive for defendants to plead at all." Blackwell, at 1339.

In United States v. Cruz, 709 F.2d 111 (1st Cir. 1983). a plea bargain between the defendant and the government was placed on the record and the trial court accepted the defendant's guilty plea. The case was continued for sentencing and preparation of a presentence investigation. The Court did not defer acceptance of the plea agreement pending the presentence investigation. At the sentencing hearing the court rejected the plea agreement based on information contained in the presentence investigation report. The Court of Appeals for the First Circuit held that the trial court had no authority to reject the plea agreement at the time of sentencing based on information contained in the presentence investigation report absent fraud. Cruz, at 114-15. See also, United States v. Olesen, 920 F.2d 538 (8th Cir. 1990).

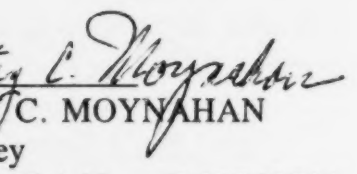
The courts reviewing Blackwell and Cruz refused to allow the lower courts to take such advantage of their respective defendants. As the Court in Blackwell stated, "the mere postponement of the sentencing itself to a future date does not authorize the judge to remake or vacate the

plea bargain for whatever reasons later seem to be appropriate to her." 694 F.2d at 1339.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Appellate and Supreme Courts of the State of Connecticut.

PETITIONER, DAVID GREEN

By 
TIMOTHY C. MOYNAHAN
His Attorney
MOYNAHAN, RUSKIN,
MASCOLO & MINNELLA
141 East Main Street
Waterbury, CT 06722

No. _____

In The

# Supreme Court Of The United States

October Term, 1995

DAVID GREEN,

*Petitioner*

v.

STATE OF CONNECTICUT,

*Respondent*

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

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**STATE OF CONNECTICUT V. DAVID GREEN**

**(13438)**

O'Connell, Heiman and Schaller, Js.

Argued November 28, 1994

Decision released December 20, 1994

Substitute information charging the defendant with the crimes of aiding assault in the first degree and conspiracy to commit assault in the first degree, brought to the Superior Court in the judicial district of New Haven, where the court, Ronan, J., entered a nolle prosequi to the charge of aiding assault in the first degree; thereafter, the defendant was presented to the court on a conditional plea of nolo contendere to the charge of conspiracy to commit assault in the first degree; judgment of guilty, from which the defendant appealed to this court. Affirmed.

Timothy C. Moynahan, with who, on the brief, were Cheryl E. Heffernan and Ronald J. Barba, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, was Michael Dearington, state's attorney for the appellee (state).

PER CURIAM. The judgment is affirmed.

---

State of Connecticut v. David Green

On consideration of the defendant for certification to appeal from the Appellate Court, (36 Conn. App. 933 [AC 13438], it is hereby ordered that said petition be, and the same is hereby denied.

Timothy C. Moynahan, in support of the petition.

Timothy J. Sugrue, Assistant State's Attorney, in opposition.

SUPREME COURT
STATE OF CONNECTICUT

NO. PSC-94-0229

State of Connecticut

v.

David Green

ORDER FOR MOTION FOR CERTIFICATION TO APPEAL

On Consideration of the petition by the defendant for certification to appeal from the Appellate Court (36 Conn. App. 933 [AC 13438], it is hereby ordered that said petition be, and the same is hereby denied.

BY THE COURT,

s/Alan M. Gannuscio
ASSISTANT CLERK-APPELLATE

Dated: February 10, 1995
Notice sent: 2/14/95
Clerk, Superior Court, New Haven, 385342
Clerk, Appellate Court
Moynahan, Ruskin, Mascolo, Minnella & Crozier
Office of the Chief State;s Attorney-Appellate Unit

Timothy C. Moynahan is support of petition; Timothy J. Sugrue, Assistant State's Attorney, in opposition.

NO. CR6-385342

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| STATE OF CONNECTICUT | : | SUPERIOR COURT, PART A |
| V. | : | JUDICIAL DISTRICT OF NEW HAVEN |
| DAVID GREEN | : | JANUARY 241994 |

**MOTION FOR SPECIFIC PERFORMANCE OF PLEA AGREEMENT**

The defendant, David Green, by and through his attorneys, the undersigned, respectfully moves this Honorable Court pursuant to Article First, Section 8, as amended, of the Connecticut Constitution, Sections 687 through 692 and 1006 of the Superior Court Rules and the Fifth Sixth and Fourteenth Amendments of the United State's Constitution and the doctrines of State vs. Nelson, 23 Conn.App. 215 (1990), Santobello vs. New York, 404 U.S. 257 (1970), to enforce the plea agreement reached between the Court (Ronan, J.) and the defendant on or before, January 14, 1994.

1. The defendant, David Green, was charged pursuant to a two count long form Information dated September 28, 1993 with the following: Count One charged Aiding Assault in the First Degree in violation of Connecticut General Statutes Sections 53a-59(a)(1) and 53a-8; Count Two charged Conspiracy to Commit Assault in the First Degree in violation of Connecticut General Statutes Sections 53a-48(a) and 53a-59(a)(1).

2. Between October 12, 1993 and January 14, 1994, undersigned counsel for the defendant herein engaged in extensive and wide-ranging plea negotiation with State's Attorney Michael Dearington and the Honorable John J. Ronan, Presiding Judge, in a good faith effort to reach an appropriate disposition in this case. See Practice Book §687.

3. Throughout each and every plea bargaining session the facts of the State's case and the victims position in regard to the case's disposition were fully articulated and discussed, as were many of the defendant's responses and rebuttals to prosecutional points.

4. On January 14, 1994, after numerous and lengthy and all encompassing discussions between the undersigned counsel and the defendant herein pursuant to Superior Court Rule Section 689, the defendant agreed to "dispose of the case" rather "than proceed to trial" and further agreed to plea guilty (nolo contendere) to Count Two of the information in exchange for a nolle on the first count. The defendant fully understood the rights he was waiving and that the Court and State had agreed to the imposition of a sentence of three and one half years on the second count to run consecutively to a sentence of 22 years he is currently serving on an unrelated conviction in the State of Florida.

5. This agreement was entered into with Judge Ronan and the State's Attorney with the full and unequivocal concurrence of the defendant and his counsel.

6. On January 14, 1994, the defendant entered a plea of *nolo contendere* before Judge Ronan to the second count of the Information as part of the above-referenced plea agreement entered into with Judge Ronan and the State's Attorney. In accordance with the plea agreement, the State's Attorney entered a *nolle prosequi* to the first count of the Information. This nolle was accepted by the Court in accordance with the plea agreement.

7. During the plea canvass, the Court (Ronan, J.) stated on the record that the plea was a result of an agreement ("there is an agreement here").

The Court informed the defendant that he would not be permitted to withdraw his plea once it had been accepted. "You cannot change your mind...once the plea is taken, the only way it can be withdrawn is with permission of the court."

The Court asked the State's Attorney and Defense Counsel if they knew of any reason the plea should not be accepted, and each responded that they knew of no such reason. A finding of guilty was then made by the Court, resulting in the defendant's conviction of Conspiracy to Commit Assault in the First Degree in violation of Connecticut General Statutes Sections 53a-48 (a) and 53a-59(a)(1).

8. The State's Attorney informed the Court that the victim in the case "had been in weekly contact with the State's Attorney's Office ever since this office became involved in the matter.". The State's Attorney further stated for the record that the victim "did not agree to the negotiated plea agreement" and "he does not feel this is appropriate." The State's Attorney had made this clear even more expansively and in detailed fashion during plea bargaining sessions in which the Court fully participated, as well as in conversations with defense counsel.

9. The Court continued the case to January 20, 1994 in order to "let the victim have his say on the record."

10. On January 19, 1994, the above-referenced plea agreement was the subject of significant unfavorable publicity by way of a news article appearing in the New Haven Register. See Exhibit A attached hereto.

11. On January 20, 1994, the Court (Ronan, J.), declined to sentence the defendant in accordance with the plea agreement after hearing from the victim in open court with the courtroom literally filled with vociferous and demonstrative friends and family of the defendant. The Court asked the defendant to withdraw his guilty plea. The defendant refused.

The Court indicated on the record that its decision for refusing to sentence the defendant in accordance with the plea agreement he himself negotiated was not based on any new information, but was simply because the victim, although not presenting anything previously undisclosed, represented his version and personal experience in a dramatic manner.

12. The case is currently scheduled, per Judge Ronan's order over defense counsel's objection, to commence jury selection on Monday January 24, 1994. At the present time, the defendant stands scheduled to commence trial on the entire Information although convicted of the second count of the Information, with a nolle entered on the first count.

13. The unilateral and foundationless rescission of the plea agreement negotiated so extensively and with full knowledge of the allegations by the Court and the Prosecutor in the above case, after it was accepted and agreed upon by the defendant, the Court and the Prosecutor, constitutes an egregious violation of fundamental fairness, due process and effective assistance of counsel.

14. Where, as here, protracted good-faith negotiations between the State of Connecticut, the presiding Judge and the defendant have been engaged in by respective counsel and the Court, and where the offer, not unreasonable on its face, has been made by the State and the presiding judge, accepted by the defendant, and that acceptance has been acknowledged by the Court and the State's Attorney's Office, and where there are no intervening events which legally or logically justify repudiation of the plea agreement, the Court must compel specific performance of the plea agreement.

WHEREFORE, for all the foregoing reasons, together with the law and arguments included within the attached Memorandum of Law, the defendant respectfully requests this Court to compel specific enforcement of the plea agreement entered into by the defendant with Judge Ronan and the State's Attorney on January 13 and 14, 1994.

THE DEFENDANT

s/Timothy C. Moynahan
Timothy C. Moynahan

s/Cheryl E. Heffernan
Chery E. Heffernan

| | | |
|---|---|---|
| NO. CR6-385342 | : | |
| STATE OF CONNECTICUT | : | SUPERIOR COURT<br>PART A |
| V | : | |
| DAVID GREEN | : | JANUARY 24, 1994 |

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR SPECIFIC PERFORMANCE OF PLEA AGREEMENT**

## I. DEFENDANT IS CONSTITUTIONALLY ENTITLED TO RELIEF FROM A BROKEN PLEA AGREEMENT ENTERED INTO BY THE COURT AND STATE.

In 1970 the United States Supreme Court ruled that plea bargaining was constitutional and an essential part of the criminal justice system. Brady v. United States, 397 U.S. 742 (1970) The Court further ruled that a broken plea bargain was a violation of due process guaranteed under the Fourteenth Amendment of the United States Constitution; consequently, it became axiomatic that a defendant is constitutionally entitled to relief from a broken plea agreement. Santobello vs. New York, 404 U.S. 257 (1970). While the Santobello case involved a plea bargain between the Defendant and the Prosecutor which was broken by the Prosecutor, the principles articulated by the Supreme Court are equally applicable (if not more so) to an instance where a court breaks a plea bargain it entered into with the defendant, as in the case at bar. State vs. Freeman, 3561 A.2d 824 (R.I. 1976).

The Santobello court held that "When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of an inducement or consideration, such promise must be fulfilled." Supra at 433. The court based this holding on its evaluation of the importance of plea negotiations to the criminal justice system.

> Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned. Supra, at 432.

Logic dictates that the United State's Supreme Court would hold that the importance of guaranteeing plea agreements is increased dramatically by the involvement of the presiding judge in orchestrating or offering them. It follows with compelling logic and reasonableness that the Supreme Court would evaluate a plea agreement bargained with the court as an irrevocable obligation or consideration, just as it has with an agreement of a prosecutor.

In State vs. Freeman, 351 A.2d 824 (R.I. 1976), the Rhode Island Supreme Court was confronted with an issue similar to the case-at-bar. In that case, as here, the court not only participated in plea negotiations but was instrumental in obtaining the plea agreement. The Rhode Island judge stated in open court at the time of plea that he would impose the recommended sentence. Here, the court was also unequivocal: "We have an agreement."

Subsequent to the plea hearing, the Rhode Island case received significant adverse publicity and it came to light that the prosecutor's office agreed to the plea bargain, contrary to its internal guidelines. At the sentencing hearing the prosecutor's office, while advising the court that it had accepted the plea bargain in error, would not renege on the agreement recognizing it was obligated to proceed with the agreement pursuant to the U.S. Supreme Court holding in Santobello vs. New York. The Trial court ruled that it was not bound by Santobello, and refused to sentence the

defendants in accord with the plea agreement. Subsequently, the defendants' guilty pleas were withdrawn and the trial on the charges resulted in convictions of the defendant. The defendant thereby appealed the court's refusal to honor the plea agreements to the Rhode Island Supreme Court.

The Rhode Island Supreme Court, relying on Santobello vs. New York, found error.

> In the circumstances of this case where the trial justice not only participated in the plea bargaining agreement but in addition stated in open court the sentence he would impose, we find no relevant difference between a situation where the prosecution fails to make a promised recommendation and where the trial justice fails to impose a promised sentence since in either case the promise clearly is part of the inducement or consideration for the plea of the accused and such promise must be fulfilled Santobello v. New York, supra.
>
> We conclude that under the circumstances the trial justice was bound by the rule in Santobello and therefore committed error in withdrawing his commitment as to sentence.

State vs. Freeman, at 829.

Having determined that the judge committed error in not sentencing the defendants in accordance with the plea agreement, the Court turned to determine the appropriate remedy for this error. The Rhode Island Supreme Court, once again relying upon Santobello, held:

> It is clear that the Court's directive [in Santobello] was not simply to reinstate the defendant's plea of not guilty, but rather, the lower court was directed to explore whether or not specific performance was the more appropriate remedy.

> Here the agreement was reached after extensive plea bargaining between the prosecutor and defendants, and the trial justice after extensive questioning regarding the voluntariness of their pleas committed himself to a sentence of from 2 to 3 years subject to the reception of a presentence report...
>
> Under the circumstances of the instant case, we are satisfied that due process and the interest of justice will be fully served by a remand for sentence in accordance with the specific performance of the sentence to which the trial justice had committed himself in furtherance of the plea bargain agreement.

State vs. Freeman, supra, at 829-830.

The validity of the Court and Prosecutor's conduct is measured not by whether it is taken in "good" faith or "bad" faith. When a prosecutor or judge makes a promise to a defendant, he makes a statement of act about the future -- a statement of what he, as an official of the State, will do for the defendant if he pleads guilty. Since the Court and the Prosecutor know that the defendant will rely on these representations in deciding to plead guilty, he has a strict duty to see that the representations are accurate. Accordingly, if a judge or a prosecutor makes a promise based on being unaware that the victim would present his injuries in a dramatic way at sentencing, the judge or the prosecutor cannot avoid his obligation simply by showing that the promise was made in "good faith." Rather, as part of the obligation to assist the defendant in making a meaningful decision, the prosecutor and the judge have a constitutional obligation to avoid mistakes. Correale v. United States, 479 F.2d 944, 947 (1st Cir. 1973) and to anticipate future contingencies, Santobello, before making such solemn representations.

Moreover, some courts have explicitly recognized that the purpose of ordering specific performance is to protect the defendant's bargained-for expectations. Thus, in

Palermo v. Warden, Green Haven State Prison, 545 F.2d 286 (2d Cir. 1976), the Second Circuit enforced the defendant's plea agreement by releasing him from prison following the expiration of the sentence he was promised in return for pleading guilty. In so doing, the court held, "...that where a defendant pleads guilty because he reasonably relies on promises by the prosecutors that are, in fact, unfulfillable, he has a right to have those promises fulfilled." Id. 269.

In most cases, the State's breach is either inadvertent or, if intentional, is arguably justified by some change of circumstances. Since here the breach is deliberate and there is no change of circumstances, there is no arguable justification to deny the specific performance to which the defendant is constitutionally guaranteed.

In addition to the views of the majority in Santobello and the interpretations of Santobello by the lower courts, common intuitions suggest that it is fundamentally unfair for the State to create and then destroy a defendant's expectations. We generally assume that people ought to keep their promises. Because of the extraordinary power of the State and the critical nature of the promises concerning criminal consequences, this obligation applies with special force to representatives of the State who enter into plea agreements with individual defendants.

It was precisely this notion of unfairness that so disturbed the court in Geisser v. United States: "This is an extraordinary case calling for extraordinary action. It is a case of the great United States going back on its word in a plea bargain made by the Department of Justice..." 513 F.2d 862, 863 (5th Cir. 1975) [emphasis added].

The standards of substantive due process hold the State to a particularly high duty of care when it makes promises to defendants in criminal cases. As the Court of Appeals for the Second Circuit said in the course of holding the State to such a promise, "...fundamental fairness and public confidence in government officials require that prosecutors be held to 'meticulous standards of both promise

and performance.'" Palermo v. Warden, Green Haven State Prison, 545 F.2d 286, 296 (2d Cir. 1976).

This high standard means that at least some of the actions we perceive to be unfair in a moral sense are also prohibited by the Constitution. It is hardly unthinkable, therefore, that such prohibited actions should include the State's failure to keep its promises after the defendant has fulfilled his part of an agreement by pleading guilty in reliance on the promise.

Our sense of unfairness is not limited to cases in which the State profits from its broken promises; it also extends to cases in which defendants are injured by broken agreements. As Professor Lawrence Tribe has written in American Constitutional Law, 470 (1978), "When the government [signals its trustworthiness], a powerful argument may be advanced that the most basic purposes of the impairment clause, as well as notions of fairness that transcend the clause itself, point to a simple constitutional principle: government must keep its word."

In People v. Reagan, 395 Mich., 306, 235 N.W. 2d 581 (1975), the defendant agreed to undergo a polygraph test in exchange for the prosecutor's promise to dismiss the damages if the test confirmed the defendant's innocence. Following the examination, the prosecutor dismissed the charges in accordance with the agreement but, subsequently, regretted the decision and reinstated the charges. Following conviction, the defendant appealed on the ground that the prosecutor had a constitutional obligation to keep his promise. The Michigan Court recognized that the agreement did not involve a plea of guilty. Nonetheless, citing Santobello, it ordered specific performance of the prosecutor's promise by revoking the defendant's conviction and dismissing the prosecution.

> "In my view, a pledge of public faith in this instance gave force to an unwise agreement which became binding upon trial court approval of nolle prosequi...

> Law enforcement processes are committed to civilized courses of action. When mistakes of significant proportion are made, it is better that the consequences be suffered than that civilized standards be sacrificed.

Reagan, at 318-319.

In the instant case, the Court apparently believed that it made a mistake in striking a bargain with the defendant. It is a view not shared by defense counsel. The bargain was not entered into lightly or haphazardly, neither was it the result of thoughtlessness, or spur of the moment action. Rather, it came after many hours of negotiation on separate days and following sessions widely separated over a long period of time. It was the product of give-and-take by all sides, the defense, the Court and the Prosecutor.

No fact went unexamined, no prosecutorial argument was either withheld or unheeded, every defense position was explored and weighed in the balance, with some, at least, apparently found not wanting.

The harm to the victim was so obvious from the facts, the warrant, the police report and the nature of the injury that it hardly needed articulation, but all of those aspects were, in fact, presented to the Court, discussed, understood and fully appreciated before an agreement was reached.

The victim's strident objection to any sort of resolution short of a maximum sentence was public knowledge but was also explored in detail at various pretrials. The parties to the agreement knew that he objected to the disposition and would be likely to vent his anger with righteous indignation, with as much vehemence as he could muster, and in as public a forum as he could access.

As a consequence of the bargain struck, everyone contemplated an end to criminal liability. From the date of the bargain and the conclusion of the agreement, not one "jot or tittle" was added to the Court's knowledge of the case, and no material change occurred. Under these

circumstances, the bargain must be honored and enforced. Michigan courts are no more honorable, moral or civilized than Connecticut courts. Generally speaking, Connecticut courts are an epitome, setting standards for those of other states. They must continue to meet our highest expectations by granting the specific performance of the plea agreement to which the defendant, here, is entitled.

## II. SPECIFIC PERFORMANCE IS THE APPROPRIATE REMEDY FOR A BROKEN PLEA AGREEMENT WHERE THE DEFENDANT HAS RELIED TO HIS DETRIMENT ON THE COURT AND STATE'S PLEA AGREEMENT IN GOOD FAITH.

"Because a defendant waives several constitutional rights when he elects to plead guilty to a criminal offense, the choice of a guilty plea is of profound significance." State v. Lopez, 197 Conn. 337, 341 (1985).

A criminal defendant is constitutionally entitled to the benefit of his bargain with the State and the Court once his guilty plea has been accepted by the court. Indeed, the State and the Court are both constitutionally and ethically bound to perform the plea bargain that induced the defendant's guilty plea. The State and the Court are bound to deliver on their negotiating inducement of a defendant as long as the inducement is both legal and possible. Communication of an inducement to plead guilty may be, on or off the record, express or implied, by way of words, conduct, information, or events -- made to the defendant personally or through his attorney. E.G.,Blackledge v. Allison, and State v. Littlejohn, 199 Conn. 631 (1986).

The constitutional principle of Santobello is that the government must satisfy the "reasonable expectations" of plea bargaining defendants. This is clear from decisions of various courts in the different states utilizing the Santobello, holding in dealing with the problems associated with broken plea agreements. In State v.. Thomas, 294 A.2d 57, 61 (N.J. 1972), the New Jersey Supreme Court was faced with a situation where the State attempted to breach a plea

agreement when the victim's death from injuries sustained at the hands of the defendant rendered the agreed upon charge of Assault inadequate to the facts of the case. The Court held that, as the defendant has a reasonable expectation that his guilty plea to the assault charge based on a plea agreement would be a final adjudication of all criminal liability flowing from the original incident, the prosecutor's subsequent attempt to bring a murder indictment violated the plea agreement and, accordingly, the Court dismissed the indictment.

> Only if it is generally believed that performance on the part of the state will not disappoint a defendant's reasonable expectation will plea bargaining become and remain a truly effective device in criminal administration. Aside from this pragmatic necessity, essential fairness dictates the same result..

Supra, 61.

The Supreme Court of Pennsylvania, in Commonwealth v. Alvarado, 276 A.2d 526 (Pa.1971), vacated a defendant's death sentence because the defendant had reasonable believed that the prosecutor has promised not to seek the death penalty if he pled guilty to murder. The Court made clear that the critical issue was the reasonableness of the expectation in the defendant that had been engendered by the prosecutor's conduct, not limited to express promises.

Prosecutor plea agreements are not the only ones enforced by way of specific performance. Various Courts have confronted the issue of broken plea agreement initiated by the court. In State vs. Poli, 271 A.2d 447 (1970), the defendant plead guilty on the eve of trial pursuant to a plea agreement he believed his counsel had made with the plea judge. The agreement provided for the defendant to plead guilty and in exchange receive a sentence of concurrent time to an unrelated charge that would not result in him serving any additional prison time. During the plea canvas, the defendant denied that any promises had been made him to

induce his plea. Subsequently a different judge sentenced the defendant to a period of incarceration to be served consecutively to the sentence on the unrelated charge, apparently in violation of the plea agreement. At a post-conviction hearing it was found that the plea judge's agreement with defense counsel was only that he would recommend to the sentencing judge a concurrent sentence, but that this recommendation would not be binding on the sentencing judge. Regardless of this fact the New Jersey Supreme Court reversed and ordered on remand for the defendant to be given the benefit of his presumed bargain as he reasonably believed he had a plea agreement that would be adhered to by the sentencing judge.

> When pleas are negotiated, the important purposes to be served are fairness to the pleading defendant and to the public...
>
> Here, the issue is not whether the plea judge actually made a promise to defendant, through his counsel, that the sentence to be imposed would be exactly the same and concurrent with the Middlesex County sentence...rather, the pertinent issue is whether defendant had a bonafide belief that such a promise was made, and whether that belief was reasonably based upon the conduct of all parties concerned, including the plea judge.
>
> Our study of the record satisfies us that the defendant reasonably and actually and in good faith did entertain such a belief when he entered his guilty pleas...
>
> Under such circumstances, we conclude that the equities mandate that the [plea agreement be enforced ....such a modification would be fair to defendant and to the public.

Supra, at 450.

In In re Villa Fierro, 96 Cal.Rptr 251 (1971), the defendant plea guilty to two misdemeanor charges based on a plea agreement obtained by his counsel with the court and prosecutor. In accordance with the plea agreement, the defendant was sentenced to the California Rehabilitative Center. Subsequently, the Department of Corrections determined that the defendant was unfit for the Rehabilitation Center and had him returned to court and sentenced to felony prison incarceration by the same judge who had sentenced him originally. The defendant appealed seeking to enforce the plea agreement and be sentenced as a misdemeanor offender. The California Court of Appeals for the Third District in ordering specific performance on the original plea agreement held:

> "Both the state and the defendant may profit from a plea bargain. The benefit to the defendant from a lessened punishment does not need elaboration; the benefit to the state lies in the savings in costs of trial, the increased efficiency of the procedure, and the further flexibility of the criminal process. Numerous courts, commissions, and writers have recognized that the plea bargain has become indispensable to the efficient administration of criminal justice. Professor Newman, in his study of plea bargaining, notes that 'A steady flow of guilty pleas and the corresponding avoidance of the time, expense, and uncertainty of trial is important to the smooth functioning of most criminal courts...Plea negotiation, with bargains duly honored, is a device necessary to administration if a steady flow of guilty pleas is to be maintained.' (Newman, pp.29. [People vs. West, 477 P.2d 409,] 413-414 [(Cal 1970)].
>
> .....
>
> We agree with the petitioner that he should be given the benefit of his plea bargain...Petitioner made a valid plea bargain and should have been given the proper

misdemeanor sentence for which he bargained.

Supra, at 253, (citations and text omitted).

See also State vs. Freedman, 351 A.2d 824 (R.I. 1976) discussed at length above.

The Connecticut Appellate Courts have not addressed specifically the issue of broken judge made plea agreement, however the Connecticut Appellate Court have address the issue of broken state made plea agreements and ordered specific performance of same.

In Green vs. Warden, 17 Conn.App. 50 (1988), the defendant plead guilty to two felony charges based on a plea agreement with the state whereby the state would not recommend a specific sentence. At the sentencing hearing the prosecutor breached this agreement by adopting the probation officer's recommendation for the maximum sentence. The defendant was thereafter sentence accordingly and appealed. The Connecticut Appellate Court in ordering enforcement of the plea bargain held:

> When a defendant's guilty plea is "induced by promises arising out of a plea bargain agreement, fairness requires that such promises be fulfilled by the state." State vs. Littlejohn, 199 Conn. 631, 644, 508 A.2d 1376 (1986), citing Santobello vs. New York, 404 U.S. 257, 261, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). In this case, the petitioner's guilty plea was conditioned on the prosecutor's promise that he would not recommend a particular sentence, and that promise was not fulfilled.
>
> ...
>
> Under the circumstances presented here we conclude that the habeas petition should have been granted. The petitioner is entitled to resentencing before a different judge in

> accordance with the terms of the plea agreement.

Supra at 52-53.

In State vs. Nelson, 23 Conn.App. 215 (1990), the defendant, after extensive plea negotiations between her counsel the court and the state's attorney, pled guilty to assault in the second degree with a motor vehicle. Throughout the plea negotiations all parties were extensively advised as to the seriousness and severity of the victims injuries and medical condition. At the sentencing hearing, the victim's mother further articulated for the record the seriousness of the victim's medical condition and the nature of the injuries. Thereafter, the defendant was sentenced in accordance with the plea agreement. Approximately four months later the victim died from the injuries sustained at the "hands" of the defendant and the State sought and obtained a warrant for the defendant's arrest for manslaughter in the second degree with a motor vehicle. The defendant moved to dismiss the manslaughter charges on the ground of double jeopardy and was denied. Thereafter the court permitted the defendant to withdraw her guilty pleas to the assault charged and enter a conditional nolo contendere plea to the manslaughter. The defendant appealed her conviction for manslaughter based on double jeopardy and the breaching of the prior plea agreement. The Connecticut Appellate Court in overturning the Manslaughter conviction and ordering enforcement of the original plea agreement held as follows:

> This essential tool [plea agreements] of the criminal justice system will lose it efficacy if the state's performance of the agreement is contrary to the reasonable expectations of the defendant. State vs. Lopez, 197 Conn. 337, 341, 497 A.2d 390 (1985); State vs. Thomas, 61 N.J. 314, 321, 294 A.2d 57 (1972). "Because a defendant waives several constitutional rights when [she] elects to plead guilty to a criminal offense, the choice of a guilty plea is of profound significance." State vs. Lopez, supra.

> If the state makes promises to the defendant in order to induce a guilty plea, those promises must be fulfilled; Santobello vs. New York, Supra, 262; and "'[t]he breaking of a promise made by the prosecutor as a result of plea negotiations is sufficient to invalidate a conviction.'" Szarwak vs. Warden, 167 Conn 10, 19, 335 A.2d 49 (1974)

Supra, at 218-219.

While the Connecticut appellate courts have not specifically addressed the issue of broken judge-made plea agreements, the Connecticut Supreme Court has recognized the effect of judicial plea bargains on defendant's and their importance. "As a result of his participation [in plea discussions], the judge is no longer a judicial officer or a neutral arbiter. Rather, he becomes or seems to become an advocate for the resolution he has suggested to the defendant." Safford vs. Warden, 223 Conn. 180, 199 (1992) (Berdon, J. dissenting).

> "The unequal positions of the judge and the accused, one with equal power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is convicted, he faces a significantly longer sentence. One facing a prison term, whether of longer or shorter duration, is easily influence to accept what appears the more preferable choice. Intentionally or otherwise, and no matter how well motivated the judge may be, the accused is subjected to a subtle

> but powerful influence." United States ex rel Elksnis vs. Gilligan, 256 F.Sup. 244, 254 (S.D.N.Y. 1966).
>
> The court in United States ex rel. Elksnis, goes on to state that "[t]he judge stands as the symbol of evenhanded justice, and none can seriously question that if this central figure in the administration of justice promises that upon a plea of guilty a fixed sentence will follow, his commitment has all pervasive and compelling influence in inducing the accused to yield his right to trial." Id.

Safford vs. Warden, 223 Conn. 180, 201-202 (1992) (Berdon, J. dissenting).
See also: State vs. Gradzik, 193 Conn. 35 (1984); State vs. Fullwood, 194 Conn. 573 (1984); and State vs. Niblack, 220 Conn. 220 (1991).

> It is of course possible that the prosecutor may have intended to promise only that he would not explicitly urge the death penalty. However, the prosecutor's subjective understanding of his promise is immaterial. To determine the content of a plea bargain we must consider what the defendant might have reasonable interpreted it to be.

[Emphasis in original.] Id. 529.

The Supreme Judicial Court of Massachusetts has also declared that due process requires enforcement of the defendant's reasonable expectations engendered by plea bargaining:

> The test as to whether there was an enforceable promise is whether the defendant had reasonable grounds for assuming his interpretation of the bargain..."

Blaike v. District Attorney for Suffolk District, 378 N.E.2d 1368, 1370 (Mass. 1978), and whether he relied on that to

his own detriment. The prosecutor's view of his promise to the defendant is irrelevant. Id. Commonwealth v. Smith, 427 N.E. 2d 739, 742 (Mass. 1981), Accord, Sanford v. Phoenix Municipal Court, 717 P.2d 900, 901 (Ariz. 1986) enforced defendant's reasonable assumption, based on his erroneous understanding of State's conduct in plea bargaining, that DWI charge would not be re-filed.

## III. THE COURT'S FAILURE TO FOLLOW THE MANDATES OF SUPERIOR COURT'S RULES SECTIONS 696 AND 697 CONCERNING PLEA AGREEMENTS WAS IMPROPER AND VIOLATED THE DEFENDANT'S DUE PROCESS RIGHTS UNDER THE FEDERAL AND STATE CONSTITUTIONS.

Superior Court Rules, Sections 696 and 697, provide for the procedure the Court must utilize in handling plea agreements. Section 697 specifically provides that when a case is continued for sentencing on a plea agreement, judicial authority "...shall inform the defendant that a different sentence from that embodied in the plea agreement may be imposed on the receipt of new information...but if such a sentence is imposed, the defendant will be allowed to withdraw his plea..."

Superior Court Rule Section 696 provides that where "...the judicial authority accepts the plea agreement, he shall embody in the judgment and the sentence the disposition provided for in the plea agreement or another disposition more favorable to the defendant than that provided for in the plea agreement."

It has long been the law in this State that where the word "shall" is used in the criminal procedure rules, the requirements indicated thereafter are mandatory. Miller v. Commissioner of Correction, 29 Conn. App. 773, 779 (1992), citing State v. Somerville, 214 Conn. 378, 387 (1990) and State v. Cook, 183 Conn. 520, 522-23 (1981). "The failure of the trial court to follow the mandatory provisions of the rules of criminal procedure constitutes

plain error." Miller, supra, citing State v. Johnson, 214 Conn. 161, 171 n.10 and State v. Pina, 185 Conn. 473, 483 (1981).

In the case-at-bar, the Court (Ronan, J.) at no time advised the defendant prior to accepting his plea that the Court had the option of not accepting the plea agreement and might sentence the defendant to a sentence other than the one agreed upon by all parties. In fact, the Court not only did not advise the defendant pursuant to Superior Court Rules Section 697, but, in fact, the Court stated for the record that the sentence was by agreement, thereby accepting the plea agreement. Therefore, pursuant to Superior Court Rules Section 696, the Court had no option other than to sentence the defendant in accordance with the accepted plea agreement or a more favorable disposition. A withdrawal of the guilty plea and a trial is not a more favorable disposition.

The Court's failure to follow our rules of criminal procedure has resulted in a denial of the defendant's due process rights guaranteed him under the United States and Connecticut Constitutions. Miller, supra, at 779. As the defendant's guilty plea has already been accepted by the Court and the Court has indicated on the record its acceptance of the plea agreement which brought about that plea, the only remedy appropriate which would make the defendant whole again and provide him with due process would be requiring the Court to adhere to the mandate set forth in Superior Court Rule Section 696 by sentencing the defendant in accordance with the accepted plea agreement or another more favorable disposition.

## IV. THE DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL ENTITLES THE DEFENDANT TO SPECIFIC PERFORMANCE OF THE PLEA BARGAIN.

Implicit in the defendant's constitutional right to effective assistance of counsel is that counsel should engage in good-faith negotiations with the prosecution in this state "with a view towards disposition." C.P.B. §687.

A necessary adjunct of that objective is that plea agreements and proposed dispositions must be mediated between the state and the defendant through counsel, where the defendant is represented by counsel. C.P.B. §688.

In effectuate a negotiated plea to a lesser charge, the State and the Court are necessarily seeking a waiver by the defendant of several constitutional rights; accordingly, principles of logic and fundamental fairness suggest that necessarily hanging in the balance of such an endeavor is the principle that neither the Prosecutor nor the Court can seek to extract such waivers in an arbitrary and capricious manner.

A criminal defendant's confidence in his counsel's abilities and in the good faith of counsel's representations are clearly implicit in his State constitutional right to effective and zealous counsel, see Siemon vs. Stoughton, 184 Conn. 547, 554-5 (1981). Effective assistance presupposes that offers of settlement in a criminal case will be negotiated according to principles of fundamental fairness and that such offers will not be withdrawn unilaterally after a clear and unequivocal acceptance thereof has been tendered.

Moreover, because"[p]lea agreements are an essential and necessary part of the administration of justice[,]" and "[t]his essential tool of the criminal justice system will lose its efficacy if the state's performance [or the court's performance] is contrary to the reasonable expectation of the defendant[,] Nelson, supra, 218, judicial enforcement of a fairly negotiated settlement is fully appropriate in order to justify public confidence in the criminal justice system, where the defendant can show, as he can here, that his expectation that the Court and the Prosecutor would fulfill their plea agreement is a reasonable one. See also, State vs. Littlejohn, 199 Conn. 631, 644 (1986).

As the Michigan Supreme Court once remarked, "In our system of jurisprudence we try cases, rather than persons." People v. Allen, 429 Mich. 558, 420 N.W. 2d 499, 503-04 (1988). Denying the defendant the relief

sought in the instant matter would amount to nothing short of a scandal.

THE DEFENDANT

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and

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